

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIMBALL AVENUE,

Plaintiff and Appellant,

v.

LUPE FRANCO,

Defendant and Respondent.

G039767

(Super. Ct. No. 04CC12000)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Dismissed.

Philipson & Simon and David Simon for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

THE COURT:*

In dismissing this appeal for lack of jurisdiction, we hold that a trial court cannot restart the clock for filing a notice of appeal by vacating and “re-entering” a judgment on the ground that the appellant never received notice of entry of judgment.

BACKGROUND

On November 30, 2006, the trial court granted defendant’s motion to enforce a settlement agreement, but took under consideration the issue of attorney fees. About two weeks later, the court issued a minute order granting defendant’s motion for attorney fees in the amount of \$12,375. On April 10, 2007, defendant served on plaintiff a notice of ruling which stated that the court granted defendant’s motion for an order enforcing the settlement agreement and ordered plaintiff to “immediately pay” to defendant \$189,671.50.

Within a week of receiving the notice of ruling, plaintiff filed an objection to the document, stating that the court had not “ordered Plaintiff to immediately pay to Defendant . . . \$189,671.50[,]” nor would such an order have been authorized. Plaintiff pointed out that under Code of Civil Procedure section 664.6, the court can only “enter judgment pursuant to the terms of the settlement” and then the prevailing party can act to enforce the judgment. (All further statutory references are to the Code of Civil Procedure unless otherwise indicated.) Moreover, plaintiff pointed out that “a judgment has not been entered[.]”

Unbeknownst to plaintiff, the court entered judgment for defendant in the amount of \$189,671.50 on April 30, 2007. The court file also contains another version of the notice of ruling that had been earlier served on plaintiff. This notice of ruling, bearing a file-stamp date of April 30, 2007, contains handwritten corrections of the original document. Specifically, someone had stricken the statement that the court had

* Before Sills, P.J., Rylaarsdam, J., and Ikola, J.

ordered plaintiff to “immediately pay” defendant, and by interlineation added that the court had “entered judgment against Plaintiff in favor of Defendant in the amount of . . . \$189,671.50.” Neither the revised notice of ruling, the judgment, nor notice of entry of judgment was served on plaintiff.

On November 6, 2007, plaintiff’s attorney happened to check the superior court website and discovered that a proposed judgment had been filed and judgment entered in the case. The court file contained no proof of service as to either document, nor did it contain a notice of entry of judgment sent by either defendant or the clerk of the court. Plaintiff promptly filed a motion to vacate the judgment as void because plaintiff had not received notice of entry of judgment as required by section 664.5, subdivisions (a) and (b).

In a minute order dated December 11, 2007, the court granted the motion to vacate the judgment. The order states: “Defendant failed to serve the proposed judgment it submitted to the court per [California Rules of Court, rule] 8.25; accordingly, plaintiff was not on notice that it needed to constantly check the records to see if judgment had been entered. [¶] The filing of the judgment on 4-30-07 is cancelled. The judgment is hereby deemed filed (12-11-07).” Plaintiff filed a notice of appeal 22 days later – 242 days after the judgment was first entered on April 30, 2007.

This court notified plaintiff that it was considering on its own motion dismissing the appeal for lack of jurisdiction. The parties were invited to file letter briefs addressing whether the trial court exceeded its jurisdiction by vacating and then reinstating the judgment as of December 11, 2007, and whether this judicial act extended the time within which the judgment could be appealed. Only plaintiff filed a letter brief.

DISCUSSION

The trial court’s unusual action in vacating a judgment nearly seven and a half months old, and purporting to “re-enter” it effective December 11, 2007, was obviously well intentioned. The court was attempting to restore plaintiff’s right to appeal

— a right lost when plaintiff failed to appeal within 180 days after entry of the judgment. (See Cal. Rules of Court, rule 8.104(a)(3).) The court was clearly bothered by the lack of notice to plaintiff in regards to the judgment, specifically citing defendant’s failure to serve plaintiff with a proposed judgment. Concededly, plaintiff received none of the notice that was its statutory due. Notwithstanding this failure of notice, however, the court lacked jurisdiction to vacate the judgment. Thus the notice of appeal is untimely.

In its letter brief, plaintiff argues the court properly vacated the judgment because it was void, and a void judgment is of no effect and can be set aside at any time. This argument fails because its premise is unsupported: Plaintiff does not establish that the April 30, 2007 judgment was void.

1. *Voidness Based on Lack of Notice of Entry of Judgment*

Plaintiff first contends the judgment is void because the statutory requirements for notice of entry of judgment set forth in section 664.5, subdivisions (a) and (b) were unmet. Subdivision (a) mandates that the party submitting a judgment for entry must serve notice of entry on all parties who have appeared in the action, and must file proof of service of same; subdivision (b) mandates that the court clerk mail notice of entry of judgment to all parties “promptly” after judgment is entered. Neither subdivision was complied with here. However, there is no merit to plaintiff’s assertion that lack of compliance with this statutory notice requirement renders a judgment void.

When both the court clerk and the party submitting the judgment fail to serve the statutorily mandated notice of entry of judgment, the sole consequence is that a longer statutory period for filing the notice of appeal comes into play. In other words, rather than the 60-day period that would have run from notice of entry of the judgment, an appellant has 180 days from entry of judgment to file the notice of appeal. (See Cal. Rules of Court, rule 8.104(a)(1) & (2); *Baldwin Park Redevelopment Agency v. Irving* (1984) 156 Cal.App.3d 428, 433; *Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864, 869.) The lack of notice does not jeopardize the judgment.

Of course, it would have been helpful to find case law holding as much. We found none, perhaps because other courts have considered this conclusion too obvious to state. Stepping into the breach, we hold that noncompliance with the statutory notice requirements for entry of judgment does *not* render the judgment void.

We note the trial court vacated the judgment based on defendant's noncompliance with a different statute. According to the minute order, the court "cancelled" the judgment because respondent failed to serve the proposed judgment on plaintiff as required by California Rules of Court, rule 8.25 ["Before filing any document, a party must serve . . . one copy of the document on the attorney for each party separately represented"]. Again, there is no basis for voiding a judgment based on a party's noncompliance with rule 8.25.

2. Voidness Based on Extrinsic Fraud

Plaintiff's second argument for finding the judgment void is based on a claim of extrinsic fraud. "Extrinsic fraud is a broad concept which covers a number of situations. 'Its essential characteristic is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' [Citation.]" (*Lovato v. Santa Fe Internat. Corp.* (1984) 151 Cal.App.3d 549, 554.) Plaintiff asserts the court's order vacating the judgment was simply an exercise of its equitable power to set aside a judgment rendered by reason of extrinsic fraud or mistake.

There are at least two problems with plaintiff's extrinsic fraud argument. First, plaintiff did not raise the claim of extrinsic fraud in the trial court. Though plaintiff failed to provide this court with a copy of its motion to vacate the judgment, the letter brief describes the motion as made on the grounds of noncompliance with section 664.5, subdivisions (a) and (b). The letter brief makes no reference to any claim of extrinsic fraud asserted in the motion. An equitable action or motion to set aside a judgment for extrinsic fraud requires specific pleading of the fraud. (See 5 Witkin, Cal. Procedure (4th

ed. 1997) Pleading § 834, p. 293.) Having failed to plead extrinsic fraud in its motion to vacate, plaintiff cannot assert extrinsic fraud now as a basis for saving its appeal.

The second problem is that the court did not make a factual finding of extrinsic fraud. Instead, the minute order states the court “cancelled” the judgment because respondent “failed to serve the proposed judgment” and thus appellant “was not on notice” of the need to monitor the court file for entry of judgment. The minute order does not mention fraud, and the court’s finding that respondent “failed to serve the proposed judgment,” without more, does not support an implied finding of fraud.

In conclusion, the judgment in the trial court was not void. Consequently, the court had no jurisdiction to vacate the judgment and “re-enter” it effective a different date.

DISPOSITION

The appeal is dismissed for lack of jurisdiction.